OFFICIAL ASSIGNEE OF THE PROPERTY OF SENATOR IBRAHIM HJ. YAAKOB

v.

SITI RAMLAH BAJAU

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA M. YATIM J
[IN BANKRUPTCY NO. 168 OF 1980]
27 SEPTEMBER 1990

BANKRUPTCY: *Deceased bankrupt - Voluntary settlement - Prior to bankruptcy - Void - Exceptions - Harta sepencarian - Malay Adat law - Definition of "settlement" - Consideration - 'Love and affection' - Bankruptcy Act 1967, ss. 52(1), (2), (3).*

H, the husband of the respondent widow W, was declared a bankrupt on 27 October 1980. Two years prior to this on 22 December 1978, H had transferred a piece of property to his wife for love and affection.

The Official Assignee applied for a declaration that the said transfer was deemed void as a voluntary settlement or transfer under s. 52 of the Bankruptcy Act 1967 (the Act) and prayed for an order to cancel the said transfer. The respondent contended that:

(i) that the transfer falls under the 3rd exception to s. 52 of the Act as it was made on or for the wife of the settlor which accrued to the settlor after marriage in the right of his wife.

(ii) that the said transfer was made merely to perfect her title to it and even if the said transfer was absolutely void against the Official assignee, her share of the said land was not affected;

(iii) as the said land was acquired during the subsistence of their marriage, she was entitled under her personal law and under Malay Adat law to claim 1/2 share of the land as *harta sepencarian* at the time of her husband's death.

Held:

[1] Based on the case law, the transfer of the said land which was made for love and affection was not purchased by W for valuable consideration and as such the transfer did not come under the second exception to s. 52 of the Act.

[2](a) Applying *Re Bower Williams*, the words "property which has accrued to the settlor after marriage in right of his wife" in s. 52(3) of the Act, mean that the property must be in the name of the wife. It is immaterial whether she acquired it before or after marriage;

(b) from the evidence in the present case it is clear that the said land was registered in the name of the respondent's husband;

(c) W's case therefore does not fall under s. 52(3) and the transfer is absolutely void against the official assignee.

[3](a) In view of the evidence contained in the respondent's affidavit, there is a presumption that the said land is *harta sepencarian;*

(b) however, although there is presumption that the said land is *harta sepencarian,* the respondent cannot claim her share of the said land during the subsistence of their marriage;

(c) it is logical to say that since the said land is registered in the name of the husband he is entitled to sell it or transfer it to a third person during the subsistence of the marriage, with or without the respondent's consent and if the said land is sold the husband can keep all the proceeds of the sale to himself.

(d) a wife can only claim her share of *harta sepencarian* when she is divorced by her husband or when the husband dies;

(e) the respondent is entitled to one half share of the said land under *harta sepencarian* upon the death of her husband.

[Order accordingly.]

Cases referred to:
Borton v. Official Receiver [1986] 4 ACLC 533
Boto binti Taha v. Jaafar bin Muhammad [1985] 2 MLJ 98
Habsah binti Mat v. Abdullah bin Josoh [1950] 16 MLJ 60
Hujah Ligah binti Jamal v. Fatimah binti Mat Diah [1950] 16 MLJ 63
In R Abbott (a bankrupt) [1983] 1 Ch 45
In Re Bower Williams [1927] All ER 275
In Re Pumfrey [1879] 10 Ch D 622
Mohamed v. Commissioner of Lands and Mines, Trengganu & Anor. [1968] 1 MLJ 227
Roberts alias Kamarulzaman v. Umni Kalthom [1966] 1 MLJ 163

Legislation referred to:
Bankruptcy Act 1967, ss. 52(1), (2), (3)
Bankruptcy Act 1869 [UK], s. 91
Bankruptcy Act 1914 [UK], s. 42(i)

Other sources referred to:
Islamic Law in Malaya 1975, Professor Ahmad Ibrahim, p. 229

For the respondent - Azizan bin Othman; M/s. Khairuddin & Associates
For the petition creditor - V.P. Pradhan; M/s. Skrine & Co.
For the official assignee - Zaleha binti Yusof

JUDGMENT

Zakaria M. Yatim J:

This is an application by the official assignee for:

(1) a declaration that the transfer of the land comprised in grant No. 11027, Lot No. 8, Mukim Batu (the said land), by the bankrupt, Senator Ibrahim bin Haji Yaakob, to his wife, Siti Ramlah bt. Bajau (the respondent) on 22 December 1978 was a voluntary settlement and is void against the official assignee under s. 52 of the Bankruptcy Act 1967;

(2) an order that the Pendaftar Geran-geran Tanah, Wilayah Persekutuan (hereinafter referred to as "the pendaftar") the proper registering authority, do cancel the said transfer; and

(3) that the respondent pay the costs of this application.

On 27 October 1980 receiving and adjudication orders were made by this Court against Senator Ibrahim bin Haji Yaakob (hereinafter referred to as "the bankrupt") on the petition of Bank of America National Trust and Savings Association. During the course of the investigation into the affairs of the bankrupt it was discovered that he had transferred the said land to his wife, who is the respondent, on 22 December 1978 for love and affection.

Mr. Liang Hien Tien, the assistant official assignee, in his affidavit in support of the application contended that the transfer of the said land by the bankrupt was a voluntary settlement or transfer within the meaning of s. 52 of the Bankruptcy Act. He stated that the transfer of the said land was made within two years prior to the transferor becoming a bankrupt, such transfer was absolutely void against the official assignee.

The respondent in her affidavit in reply averred as follows. She was the lawful widow of the bankrupt. They were lawfully married in Kuala Lumpur on 30 April 1942. The transfer of the said land by the bankrupt to the respondent did not constitute and was not a voluntary settlement or transfer within the meaning of s. 52 of the Bankruptcy Act and the transfer was not absolutely void against the official assignee. The settlement of the said land came within the exceptions to s. 52 of the Bankruptcy Act since it was made on or for the wife of the settlor which was accrued to the settlor after marriage in the right of his wife. The respondent claimed that she and her husband, the bankrupt purchased the said land on 17 August 1943. The said land was acquired during the subsistence of their marriage by the bankrupt out of their joint resources and efforts, although the land was registered in the name of her husband. She claimed that, as lawful widow, she was entitled under her personal law and pursuant to the Malay Adat law to have one half share of the said land as *harta sepencarian* at the time of her husband's death. According to her, even if the transfer of the said land by the bankrupt to her was a voluntary settlement or transfer, the transfer was not absolutely void against the official assignee as she claimed that the transfer was made merely to perfect her title to it. The transfer was made by her husband because of his deteriorating health conditions. Accordingly the settlement did not fall within the meaning of s. 52. She contended that assuming that the transfer was absolutely void against the official assignee her share on the said land was not affected.

In order to consider the application it is necessary to state the relevant provisions of s. 52 of the Bankruptcy Act. Under s. 52(1) of the Act, any settlement of property shall, if the settlor becomes a bankrupt within two years after the date of the settlement be absolutely void against the official assignee, except in the following cases, namely,

(1) a settlement made before and in consideration of marriage; or

(2) a settlement made in favour of a purchaser or incumbrancer in good faith and for valuable consideration; or

(3) a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.

The word "settlement" is defined in subsection 3 of s. 52 to include any conveyance or transfer of property. Under s. 2 the word "property" includes land and every description of property, whether real or personal and whether situated in the Federation or elsewhere. It is not in dispute that in the present case the property in question is a piece of land which is situated in Selangor.

From the evidence, it is established that receiving and adjudicating orders were made against the respondent's husband on 27 October 1980. The said land which was registered in the bankrupt's name was transferred to the respondent on 22 December 1978. The evidence shows that the respondent's husband became a bankrupt within two years after the date of the transfer of the said land. Such transfer would be absolutely void against the official assignee unless the settlement falls within one of the three exceptions.

The first exception does not apply to the present case because the transfer was not made in consideration of marriage.

The question is whether the second exception is applicable here, that is whether the transfer was made to the respondent as purchaser for valuable consideration.

According to the memorandum of transfer (Borang 14A) exhibited to Liang Hien Tien's affidavit the said transfer was made for love and affection. In my opinion the said transfer, which was made for love and affection is void under s. 52 of the Bankruptcy Act. In *Ex parte Hillman. In Re Pumfrey* [1879] 10 Ch. D. 622 a trader executed a post nuptial settlement on 1 July 1875 whereby he, in consideration of the natural love and affection where he bore to his wife, assigned to trustees on certain trusts for the benefit of his wife and children, two houses and furniture and other effects subject as to the houses, to the payment of rent reserved and to the performance and observance of the lessee's covenants and conditions contained in the underlease. On 23 February he filed a liquidation petition. On 19 March his creditors resolved to accept a composition, payable in installments over a period of eighteen months. He failed to pay some of the installments and he was adjudicated bankrupt. The trustee in the bankruptcy applied to the county Court for an order declaring the settlement void as against him under s. 91 of the Bankruptcy Act 1869. The county Court declared the settlement as to the chattels void and decided that good consideration had been given for the assignment of the two houses. He decided that the settlement in respect of the houses was valid. The trustee appealed to the Chief Judge in Bankruptcy. The decision of the learned Judge was reversed by the Chief Judge, who said,

> The present case does not fall within any of the exceptions, and there can be no doubt that the assignment in question is invalid as against the creditors of the bankrupt, and that the trustee ought to be declared entitled to the households as well as to the chattels.

The decision of the Chief Judge was affirmed by the Court of Appeal. *Ex parte Hillman* is relevant to the present case because s. 91 of the English Bankruptcy Act 1869 is in *pari materia* to s. 52 of our Bankruptcy Act.

In a more recent case, *In R Abbott (A Bankrupt)* [1983] 1 Ch. 45 at p. 57, Sir Robert Megarry VC in his judgment, at p. 57 said,

> Plainly 'good consideration' in the sense of the natural love and affection that a man has for his wife and children, is not enough. Nor is a merely nominal consideration, even though it would suffice to support a simple contract at common law. In the context of the avoidance of settlements by a trustee in bankruptcy, a 'purchaser' for valuable consideration' must be someone who can not only be described as being a 'purchaser' but can also be said to have given a consideration for his purchase which has a real substantial value, and not one which is merely nominal or trival or colourable.

The above passage was adopted by the Australian High Court in *Borton v. Official Receiver* [1986] 4 ACLC 533.

From the authorities I have just cited I am satisfied that the said land was not purchased by the respondent for valuable consideration. Therefore, the second exception is not applicable to his case.

It is the contention of the respondent that the transfer of the said land falls under the third exception. I shall now consider whether the transfer of the said land falls under the third exception. In order to consider this question it is necessary to ascertain the meaning of the words, "property which has accrued to the settlor after marriage in right of his wife" in the

third exception. The relevant provision in s. 52 of the Bankruptcy Act is in *pari materia* with s. 42 of the English Bankruptcy 1914. In *Re Bower Williams* [1927] All ER 275, the English Court of Appeal considered the meaning of the third exception in the light of the evidence before it. In that case a husband and wife married in 1913. In 1925 the wife died intestate, and the husband became entitled *jure mariti* to certain shares in a company which had belonged to her. The husband took out letters of administration to her estate. He then made a voluntary settlement of the shares on certain trusts for the benefit of their daughter as well as for himself. Ten months later he was adjudicated a bankrupt. The question before the Court was whether the property settled accrued to the husband "in right of his wife" within the meaning of s. 42(1) of the Bankruptcy Act 1914. The Court of Appeal decided that the property had accrued to the husband "after marriage in right of his wife" within the meaning of the exception in s. 42, and the settlement, so far as the daughter was concerned, was valid against the trustee in bankruptcy. In his judgment at p. 278 Lord Hanworth MR said,

> So I think that here the husband takes because he is the husband, not because he is the administrator. I think the judgments of Cotton LJ, and Lord Lindley both make that clear. A little further on Lord Lindley says:
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> > 'There is now no doubt as regards the choses in action of the wife not reduced into possession during the coverture, that if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law and in equity; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, holds them in trust for the husband. That appears to me to be the law as settled ever since the case in Peere Williams.'
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> For these reasons, and because that case is binding on this Court, it appears to me that we must hold that the beneficial interest in these shares accrued to the bankrupt in right of his wife, and therefore, the settlement on the daughter remains good.

Lawrence LJ in his judgment in the same case at p. 279 said,

> The question is whether the property settled by this settlement does not fall within the exception of s. 42 of the Bankruptcy Act 1914, as property which has accrued to the bankrupt after marriage 'in right of his wife'. The property consists of shares in a limited company which stood in the name of the bankrupt's wife at her death. It is not disputed that the beneficial interest in these shares vested in the bankrupt on the death of his wife, but it was strenuously contended that, as the husband took no interest in the shares during his wife's lifetime, they did not accrue to him in right of his wife. It is said that the words 'in right of his wife' in the exception in s. 42 only apply to property acquired by the husband during the coverture, and are not applicable to property acquired by the husband after the determination of the coverture and in respect of which property it is necessary to take out letters of administration. There is no authority which binds the Court to confine the language of s. 42 in that way. The property accrued to the bankrupt solely by virtue of his position as husband. Further, the beneficial interest would have vested in him, whether letters of administration had been taken out by him or by some other person. In my opinion, the shares were property which accrued to him 'in right of his wife' within the ordinary meaning of that expression.

Following the decision in *Re Bower Williams*, it seems to me that the words "property which has accrued to the settlor after marriage in right of his wife" in s. 52 of the Bankruptcy Act, mean that the property must be in the name of the wife. It is immaterial whether she acquired it before or after marriage. The property is accrued to the husband solely by virtue of his position as a husband when the wife dies intestate. Under the section the property can only be acquired by the husband during coverture.

From the evidence in the present case it is clear that the said land was registered in the name of the respondent's husband. This is evident from a copy of the document of title exhibited to the respondent's affidavit. According to the document, the said land was registered in the name of the respondent's husband on 17 April 1943, that is after their marriage. In her affidavit, the deponent did not expressly state that she contributed towards the purchase of the land. In any event her name does not appear in the document of title as the co-owner of the said land. The land was only transferred to her name on 23 December 1978. Applying the principles laid down in *Re Bower Williams* to the present case, I do not think, after considering the facts in the present case, that the respondent's case comes under the third exception. In the circumstances, the transfer of the said land to the respondent is absolutely void against the official assignee under s. 52 of the Bankruptcy Act.

The respondent however claims that since the said land acquired during the subsistence of their marriage, she is entitled, under her personal law and under *adat* law to claim one half share of the said land as *harta sepencarian.* It is not in dispute that the respondent is a Muslim and a Malay and that she married her husband in Kuala Lumpur and that she is residing in Kuala Lumpur. In her affidavit, she was relying on the third exception on the ground that she was entitled to claim one half of the said land as *harta sepencarian.* She stated that the transfer of the said land to her was merely to perfect her title to it.

It is now necessary to consider the Malay customary law relating to *harta sepencarian.* The principle of *harta sepencarian* has been laid down by Raja Azlan Shah J, as he then was, in *Roberts alias Kamarulzaman v. Ummi Kalthom* [1966] 1 MLJ 163. In his judgment at p. 165, the learned Judge said,

> *harta sepencarian* is a matter of Malay *'adat'* and is applicable only to the case of a divorced spouse who claims against the other spouse during his or her life time; this rule of law is local law which the Court must take judicial notice. I am of the view that once it is clearly established that property was acquired subsequent to the marriage out of their joint resources or by their joint efforts a presumption arises that it is *harta sepencarian.* The presumption is rebuttable such as by the evidence that the property was acquired by the sole efforts or resources of the husband.

The learned Judge held that the property in question was acquired by the joint resources of the parties and therefore it was *harta sepencarian.* He ordered that the property be sold and the proceeds be shared equally between the parties.

The decision in *Roberts* case was approved by the Federal Court in *Mohamed v. Commissioner of Lands and Mines, Trengganu & Anor.* [1968] 1 MLJ 227.

It will be noted that in *Roberts* case, once it is established that property acquired during the subsistence of the marriage out of the joint resources of the husband and wife, a presumption arises that the property is *harta sepencarian.* See also *Boto binti Taha v. Jaafar bin Muhammad* [1985] 2 MLJ 98 and *Habsah binti Mat v. Abdullah bin Josoh* [1950] 16 MLJ 60. In the present case, the respondent, in her affidavit averred that the said land was acquired during the subsistence of their marriage out of their joint resources and efforts even though the land was registered in the name of the bankrupt. In my opinion in view of the evidence contained in the respondent's affidavit, there is a presumption that the said land is *harta sepencarian.* There is no evidence before me to rebut the presumption.

Although there is presumption that the said land is *harta sepencarian,* it seems to me that the respondent cannot claim her share of the said land during the subsistence of their marriage. I am unable to find any authority on this point but I think it is logical to say that

since the said land is registered in the name of the husband he is entitled to sell it or transfer it to a third person during the subsistence of the marriage, with or without the respondent's consent and if the said land is sold the husband can keep all the proceeds of the sale to himself.

In my opinion a wife can only claim her share of *harta sepencarian* when she is divorced by her husband or when the husband is dead. In his book, *Islamic Law in Malaya, 1975*, at p. 229, Professor Ahmad Ibrahim wrote:

> a divorced wife is entitled to a share of all land acquired during marriage

In *Roberts* case, Raja Azlan Shah J, said at p. 165, that with regard to

> the division of the *harta sepencarian,* I can safely say that a divorced spouse is entitled to a share.

In *Habsah binti Mat v. Abdullah supra.,* Callow J said at p. 61,

> In my judgment once it is established that the property was acquired subsequent to marriage, and the wife was seen working thereon, a presumption arises that on divorce it is subject to syarikat.

See also *Boto binti Taha v. Jaafar, supra;* and *Mohamad v. Commissioner of Lands and Mines, supra.* With regard to a claim by a wife after the death of her husband, see *Hujah Ligah binti Jamal v. Fatimah binti Mat Diah* [1950] 16 MLJ 63.

The respondent however claimed in her affidavit that she was entitled to a share of the said land as the widow of the bankrupt. In para. 8 of her affidavit she states,

> I am advised and verily believe that as the lawful widow, I am entitled under my personal law and pursuant to the Malayan Adat Law to claim one-half share of the said land as '*harta sepencarian*' at the time of his death.

It is not clear when her husband died but it must be after he was adjudicated a bankrupt. In any event, the respondent is entitled to one half share of the said land under *harta sepencarian* upon the death of her husband.

For the reasons stated above, I make the following order:

(1) I declare that the transfer of the land comprised in grant No. 11027, Lot No. 8, Mukim Batu by the bankrupt, Senator Ibrahim bin Haji Yaakop, to his wife, the respondent on 22 December 1978 was a voluntary settlement and is void against the official assignee, under s. 52 of the Bankruptcy Act 1967.

(2) I order that the Pendaftar Geran-geran Tanah, Wilayah Persekutuan, the proper registering authority cancel the said transfer.

(3) The respondent is entitled to one half share of the said land as the widow of the bankrupt under *harta sepencarian.* If the said land is sold to pay the creditor or creditors of the bankrupt, she is entitled to receive half of the proceeds of the sale of the said land and her share of the proceeds of the sale cannot be used to pay her late husband's creditor or creditors.

Also found at [1991] 2 CLJ 1186